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No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

ABDUL SANEH,

*Petitioner,*

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

*Respondent.*

*On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Sixth Circuit*

**PETITION FOR WRIT OF CERTIORARI**

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January 8, 2009

**QUESTION PRESENTED**

May an individual withdraw from a voluntary departure agreement and file a motion to reopen when this agreement contains a "tailor made" provision to not file a motion to reopen?

## **PARTIES TO THE PROCEEDING**

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6

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## CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Second Circuit dismissing Petitioner's petition for review is unreported. *Saneh v. Mukasey*, No. 07-3079 (6<sup>th</sup> Cir. June 23, 2008). App 1a

The decision of the United States Court of Appeals for the Second Circuit denying Petitioner's petition for rehearing *en banc* is unreported. *Saneh v. Mukasey*, No. 07-3079 (6<sup>th</sup> Cir. October 10, 2008). App 26a

The agency decision of the Board of Immigration Appeals denying Petitioner's appeal is unreported. *Matter of Saneh*, File A27-400-115 (BIA January 11, 2007). App 12a

The agency decision of the Immigration Court denying Petitioner's motion to reconsider is unreported. *Matter of Saneh*, File A27-400-115 (United States Immigration Court, Detroit, April 12, 2006). App 15a

The agency decision of the Immigration Court denying Saneh's motion to stay deportation is unreported. *Matter of Saneh*, File A27-400-115 (United States Immigration Court, Detroit, April 6, 2006). App 19a

The agency decision of the Immigration Court denying Saneh's Adjustment of status and granting voluntary departure is unreported. *Matter of Saneh*, File A27-400-115 (United States Immigration Court, Detroit, February 23, 2006). App 22a

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth circuit denied Petitioner's timely filed petition for rehearing *en banc* on October 10, 2008. Jurisdiction is therefore proper by writ pursuant to 28 U.S.C. § 1254(1). While the Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. § 1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for review". 8 U.S.C. § 1252 (a)(2)(D).

## STATEMENT OF THE CASE

Petitioner seeks to withdraw from his voluntary departure agreement to pursue a motion to reopen based on the reasoning of *Dada v. Mukasey*, 128 S.Ct. 2307 (2008), (hereinafter referred to as "Dada"). This voluntary departure agreement contains an express provision that he may not file a motion to reopen. App 23a

The Sixth Circuit has denied the case stating that *Dada* does not apply since the voluntary departure agreement contains a "tailor made" provision not to file a motion to reopen. This reasoning is in contradiction to this court's decision in *Dada* which states that:

"We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen." *Dada p. 18*

## FACTUAL BACKGROUND

The Petitioner is a citizen of Lebanon who was born on November 12 1954. He entered the United States on November 16, 1984 as an F-1 student. The Petitioner is married with two US Citizen children.

A notice to appear was issued to the petitioner alleging that he was in the United States without status. The petitioner filed various applications for relief which were denied, and then voluntary departure was granted on the express condition that petitioner does not file a motion to reopen. App 23a.

Petitioner did not willfully or voluntarily enter into this agreement, because he was misled by opposing counsel and the immigration judge that he could reenter the United States after 14 months and other "benefits" of the voluntary departure agreement. In actuality, accepting the voluntary departure agreement was disastrous for his case. For example, by leaving the United States he would not be permitted to reenter due to the ten-year bar pursuant to 8 U.S.C. § 1182(a)(9)(B)(i)(II), resulting from his unlawful presence in the United States. App 4a

At immigration court, both the Immigration judge and opposing counsel failed to mention this to petitioner when they induced him to accept voluntary departure and waive his motion to reopen rights. App 4a

Petitioner filed a timely motion to reconsider with the Immigration Court so that he can withdraw from the agreement. The motion to reconsider was denied on April 12, 2006. App 15a

The denial of the motion to reconsider was timely appealed to the Board of Immigration Appeals ("BIA"). The Board of Immigration Appeals summarily affirmed the Immigration court's decision, without opinion on January 11, 2007. App 12a

A petition for review of the BIA denial was timely filed with the US Court of Appeals for the Sixth Circuit, which was denied on June 23, 2008. App 1a

Petition for rehearing was timely filed with the US Court of Appeals for the Sixth Circuit. However, it was denied on October 10, 2008 by stating that *Dada* only applies to "boilerplate" voluntary departure agreements and not "tailor made" voluntary departure agreements:

To be sure, Saneh did forgo the opportunity to file a motion to reopen his proceeding. But his forfeiture of his statutory right to seek reopening stemmed not from the intersection of two conflicting provisions, the cause of Dada's dilemma, but rather from his own compromise with the government. In request voluntary departure, Saneh expressly "agree[d] to not file a motion to reopen." not a boilerplate provision but a tailor made concession. Thus, whatever Saneh lost by agreeing to voluntary departure, he lost by his own deliberate consent." App 26a

Petitioner has been trying withdraw from the agreement to reopen his case but has been prevented from doing so based on the voluntary departure agreement's provision that he is not permitted to file a motion to reopen.

## SUMMARY OF ARGUMENT

Saneh seeks to withdraw from his voluntary departure agreement and pursue a motion to reopen. However, since the agreement contains a provision not to file a motion to reopen, the sixth circuit held that *Dada* does not apply. This conflicts with the reasoning in *Dada*, which states:

“We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen.” *Dada* p. 18

This writ should be granted to resolve the conflict between the Sixth Circuit’s decision and *Dada*.

## ARGUMENTS

The Sixth Circuit’s decision conflicts with the Supreme Court decision in *Dada*. The central issue in this case is that Mr. Saneh is unable to reopen his case due to the voluntary departure agreement, which contains a provision that he not file a motion to reopen.

However, according to the recent supreme court decision of *Dada* an individual has the right to withdraw from the voluntary departure agreement and seek a motion to reopen. The merits of the motion to reopen are irrelevant.

The sixth circuit stated:

"Even had he not agreed to voluntary departure, Saneh would have been found removable. Accordingly, Saneh fails to show that he would have been prejudiced by the alleged improper waiver" App 11a

Furthermore, Sixth Circuit states in its denial of the petition for rehearing *en banc*:

"To be sure, Saneh did forgo the opportunity to file a motion to reopen his proceeding. But his forfeiture of his statutory right to seek reopening stemmed not from the intersection of two conflicting provisions, the cause of Dada's dilemma, but rather from his own compromise with the government. In request voluntary departure, Saneh expressly "agree[d] to not file a motion to reopen." not a boilerplate provision but a tailor made concession. Thus, whatever Saneh lost by agreeing to voluntary departure, he lost by his own deliberate consent." App 26a

This conflicts with the Supreme Court decision:

"We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen." Dada *p. 18*

Nowhere in *Dada* did the court state that the decision only applies to "boilerplate" voluntary departure agreements.

Petitioner requested the Sixth Circuit to follow the supreme court in *Dada* and permit Saneh to withdraw from the voluntary departure agreement and file a motion to reopen (which is his statutory right according to *Dada*), so that the BIA or IJ can consider his claim to adjustment of status. However, the Sixth Circuit has denied the petitioner this right on the grounds that the agreement contains an express provision not to file a motion to reopen.

The Supreme Court has held in *Dada* that voluntary departure recipients are permitted to unilaterally withdraw from their voluntary departure request before the expiration of the voluntary departure period. In reaching this conclusion, the Court rejected the government's position that a person granted voluntary departure knowingly surrenders the opportunity to seek reopening. By allowing withdrawal prior to the expiration of voluntary departure, the Court's decision sought to safeguard the statutory right to file a motion to reopen. Furthermore, *Dada* stated that the merits of the motion to reopen are irrelevant.

### **REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI**

Resolution of this issue now, is a much better alternative than have thousands of cases clog up the lower courts. This issue will thus inevitably come to this court repeatedly until it is addressed. It is thus

better to deal with this narrow specific issue now and provide clarity to the lower courts.

The impact is certainly of national importance, given the thousands of individuals potentially effected. Failure to grant this writ, will provide the government with an opportunity to completely circumvent *Dada* by inducing individuals to accept voluntary departure with express provisions to waive appeal or motion to reopen rights. Since thousands of cases are effected, this case is of sufficient importance to support granting this petition.

### CONCLUSION

Petitioner requests this writ be granted. Petitioner has been improperly denied his statutory right to file a motion to reopen.

Respectfully Submitted,

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## **APPENDIX**

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**APPENDIX A**

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**NOT RECOMMENDED FOR  
FULL-TEXT PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**No. 07-3079**

**[Filed June 23, 2008]**

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ABDUL SANEH,	)
	)
<b>Claimant-Appellant,</b>	)
	)
v.	)
	)
MICHAEL MUKASEY,	)
ATTORNEY GENERAL	)
	)
<b>Defendant-Appellee.</b>	)

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**ON APPEAL FROM THE BOARD  
OF IMMIGRATION APPEALS**

**OPINION**

**Before: KEITH and SUTTON, Circuit Judges;  
ACKERMAN, District Judge.\***

**HAROLD A. ACKERMAN, District Judge.** Claimant Abdul Saneh was found eligible for removal from the United States, and subsequently agreed to voluntarily depart with the condition that he waive appeal. Saneh now challenges the Immigration Judge's finding that Saneh's waiver was properly made, and that Saneh was ineligible for adjustment of status or cancellation of removal. For the reasons stated below, we hold that Saneh's appeal is without merit because he fails to show prejudice resulting from an allegedly improper waiver.

## I.

Abdulraouf Saneh, born in 1954, is a native and citizen of Lebanon. Saneh first entered the United States in 1984, with his wife Aicha, on an F-1 student visa. The couple has two children, Chafic and Mohamed, both United States citizens.

On September 16, 2003, the Department of Homeland Security ("DHS") commenced removal proceedings against him after DHS alleged that Saneh had failed to properly maintain his residency status. DHS charged Saneh with removability under 8 U.S.C. § 1227(a)(1)(C)(I) for failing to comply with the conditions of his visa.

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\* The Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

Saneh had an initial calendar hearing before the Immigration Court on November 20, 2003. His next hearing was scheduled to occur in May 2004. In the interim, Saneh applied for two related immigration petitions: an I-140 Immigrant Petition for Alien Worker application and an I-485 Application to Adjust Status to Permanent Resident. Both were filed on October 8, 2003. Saneh then moved to continue his May 2004 hearing to allow more time for his I-140 petition to be approved. On April 15, 2004, the Immigration Judge ("IJ") denied Saneh's motion. Saneh also filed an Application for Cancellation of Removal on January 6, 2004.

On February 23, 2006, Saneh appeared, with counsel, at his removal hearing. The IJ heard testimony and received evidence concerning Saneh's visa violation and his request for cancellation of removal. The IJ ultimately determined that Saneh was removable and ineligible for relief, including cancellation of removal. (JA at 350.) Immediately thereafter, however, the IJ voided his order and granted a stipulation agreed upon between the parties that Saneh be allowed 120 days to voluntarily depart the United States in lieu of removal, pursuant to the Immigration and Nationality Act ("INA") § 240B; 8 U.S.C. § 1229. (JA at 350-51.) The grant of voluntary departure was conditioned upon Saneh not filing a motion to reopen his case or an appeal of the IJ's decision. (*Id.*) Had Saneh not agreed to voluntarily depart, he would have been subject to compulsory removal, but would have retained a right to appeal.

On March 24, 2006, Saneh filed a motion to reconsider, asserting that the Government's trial attorney falsely represented to Saneh during the

hearing that he would be able to return to the United States in about 14 months once his I-140 became current, and further, that the Government attorney had not mentioned that Saneh would be subject to a ten-year bar on reentry pursuant to 8 U.S.C. § 1182(a)(9)(B)(i)(II), resulting from his time of illegal residence in the United States. Saneh claimed that he “relied to his detriment on these false representations before being forced into accepting voluntary departure.” (JA at 341.) He also argued that the IJ should have granted a continuance of his hearing to allow for Saneh’s visa to become current, which may have in turn rendered him eligible for adjustment of status. (*Id.*) The Government opposed the motion. It noted that Saneh discussed the option of voluntary departure with his counsel and that Saneh chose voluntary departure rather than a removal order with a right of appeal. (JA at 337-38.) The Government further argued that Saneh was ineligible for adjustment of status, and that Saneh should not be granted cancellation of removal.

On April 12, 2006, the IJ denied Saneh’s motion to reconsider. (JA at 117-18.) The IJ recounted the facts of his February 23, 2006 hearing. At the outset, he noted that Saneh had stipulated on February 23, 2006 that “he had no proof that a visa was immediately available.” (JA at 117.) The IJ stated that after he received the evidence supporting Saneh’s removal, the Government offered Saneh voluntary departure in lieu of removal. Saneh considered this option with the assistance of counsel for twenty minutes, but “represented to the Court prior to the decision that he was not interested in the Government’s offer.” (*Id.*) The IJ then indicated that he denied Saneh’s application for cancellation of removal, finding that

Saneh had failed to show the requisite hardship to a qualifying relative. The IJ remarked that Saneh subsequently requested that DHS renew its offer of pre-hearing voluntary departure: "When the Government acquiesced," the IJ observed, "[Saneh] then again pondered the renewed offer and then ultimately accepted the offer." (*Id.*) The IJ then stated that "[w]hile the Government argued in its closing argument on cancellation that [Saneh] might be able to adjust his status in the near future, there was never any such promise . . . . [and] there was absolutely no duress." (*Id.* at 118.) The IJ concluded that Saneh's stipulation to voluntary withdrawal was knowing, intelligent, and voluntary, and that, even in the absence of waiver, he was ineligible for relief to adjust his status or cancel his removal.

Saneh appealed the IJ's decision to the BIA. On January 11, 2007, the BIA affirmed the IJ's decision without opinion.

## II.

An undocumented resident may file a motion to reconsider an IJ's decision based on an error of law or fact. 8 U.S.C. § 1229a(c)(6)(A), (C). "The purpose of a motion to reconsider is not to present new evidence [.]” *Alizoti v. Gonzales*, 477 F.3d 448, 452 (6th Cir. 2007); *see also Dada v. Mukasey*, 554 U.S. --, 2008 WL 2404066, at \*8 (June 16, 2008). When the BIA adopts the IJ's decision without opinion under 8 C.F.R. § 1003.1(e)(4)(ii), we review the IJ's decision upon appeal. *Denko v. INS*, 351 F.3d 717, 726 (6th Cir. 2003).

The IJ's denial of a motion to reconsider a removal order is reviewed under an abuse of discretion standard. *Sanusi v. Gonzales*, 474 F.3d 341, 345 (6th Cir. 2007). Abuse of discretion can be shown when the IJ's decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Balani v. INS*, 669 F.2d 1157, 1161 (6th Cir. 1982); see also *Babai v. INS*, 985 F.2d 252, 255 (6th Cir. 1993) (observing that the BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to law). "That a different decision would also have been within the [BIA]'s discretion cannot suffice to render [a] decision an abuse of discretion." *Alizoti*, 477 F.3d at 453.

Saneh first challenges his agreement to voluntarily depart, arguing that his waiver of rights accompanying his agreement was improperly obtained. Saneh's essential argument is that his waiver of appeal was not knowing because he was misinformed that he would be able to return in approximately 14 months, when his visa would supposedly become current. In fact, he is barred from returning for 10 years. See 8 U.S.C. § 1182(a)(9)(B)(i)(II) ("Any alien [ ] who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.").<sup>1</sup>

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<sup>1</sup> An exemption to removal may be granted for an undocumented resident who is "the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission . . . would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien."

However, we need not reach this issue because Saneh fails to demonstrate that he has been prejudiced by this alleged improper waiver.

“[I]n order to prevail on a procedural due process challenge,” Saneh must demonstrate “prejudice.” *Graham v. Mukasey*, 519 F.3d 546, 549 (6th Cir. 2008). “Indeed, we need not address the merits of a claim if there is no demonstration of prejudice[.]” *id.* at 549, because “[s]uch proof of prejudice is necessary to establish a due process violation in an immigration hearing,” *Warner v. Ashcroft*, 381 F.3d 534, 539 (6th Cir. 2004). To establish prejudice, Saneh must show that the alleged waiver violation “would have changed the outcome of the case.” *Garza-Moreno v. Gonzales*, 489 F.3d 239, 242 (6th Cir. 2007) (internal quotation marks and citation omitted).

Even were his waiver of appeal found improper, Saneh fails to show that the IJ abused his discretion when he found that Saneh was not entitled to adjustment of status or cancellation of removal. First, regarding Saneh’s application for adjustment of status, the IJ recounted that Saneh “stipulated he could not demonstrate there was a visa immediately available[.]” (JA at 117), a necessary prerequisite for an I-485 adjustment of status application. Further, to this date,

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8 U.S.C. § 1182(a)(9)(B)(v). Saneh does not qualify for this exemption because neither his parents nor his spouse are United States citizens or lawful permanent residents. Further, while Saneh was not formally ordered removed due to his voluntary departure agreement, had he been, he still would have been barred for 10 years. *See* 8 U.S.C. § 1182(a)(9)(A)(ii) (detailing that an alien ordered removed may not seek readmission within 10 years of the date of departure or removal).

Saneh is still unable to show that his visa is current. Without a current visa, Saneh does not qualify for adjustment of status. *See Matovski v. Gonzales*, 492 F.3d 722, 727 (6th Cir. 2007) (summarizing the prerequisites to approval for adjustment of status applications, including that “an immigrant visa [must be] immediately available to him at the time his application is filed.”) (internal quotation omitted).

Saneh argues that the IJ abused his discretion because he should have delayed his decision on adjustment of status until Saneh’s visa became available. Saneh relies on “Section s.245 operations instructions” which states that “[w]hen a properly filed application cannot be completed solely because visa numbers became unavailable subsequent to the filing, the application will be held in abeyance until a visa number is allocated.” (Saneh’s Br. at 17-18.) This Court believes that Saneh’s cursory citation refers to Operations Instructions 245.4(a)(6), which regulates DHS internal procedures. The BIA has held, and some sister circuits have commented, that abeyance under instruction 245.4(a)(6) may be granted if issuing a visa depends only on the availability of the undocumented immigrant’s assigned number. *In re Ho*, 15 I. & N. Dec. 692, 694, 1976 WL 32356 (BIA 1976); *see also Merchant v. U.S. Attorney Gen.*, 461 F.3d 1375, 1379 n.7 (11th Cir. 2006); *Hernandez v. Ashcroft*, 345 F.3d 824, 844 n.21 (9th Cir. 2003).

Had Saneh been eligible for adjustment of status, this operations instruction may have merited further review. However, under 8 U.S.C. § 1255(c), Saneh is statutorily ineligible for adjustment of status, which in turn renders instruction 245.4(a)(6) inoperative. (*See* Operations Instruction 245.4(a)(6), JA at 94 (“When a

properly filed application cannot be completed *solely because visa numbers became unavailable* subsequent to the filing, the application will be held in abeyance until a visa number is allocated.”) (emphasis added.) Under § 1255(c), an alien is ineligible for adjustment of status if he “is in unlawful immigration status on the date of filing the application for adjustment of status or [ ] has failed . . . to maintain continuously a lawful status since entry into the United States [.]” 8 U.S.C. § 1255(c). It is undisputed that Saneh filed an application for adjustment of status on October 8, 2003, after his lawful immigrant status had lapsed.<sup>2</sup> Saneh offers no argument or evidence here indicating that he was, contrary to the IJ’s finding, in “lawful status” when he filed an adjustment of status application. Thus, the IJ did not err when he found Saneh ineligible for an adjustment “because he is out of status” under § 1255(c).

In his motion for reconsideration, Saneh also sought, alternatively, to cancel his removal. The INA provides:

(1) [ ]The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who

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<sup>2</sup>The Government asserts, without dispute from Saneh, that DHS “filed a Notice to Appear with the Immigration Court on September 16, 2003,” charging “Saneh with removability . . . for failing to comply with the conditions of his visa.” (Gov’t Br. at 3-4.) Further, in a Notice to Appear dated January 15, 2003, the Government asserted that Saneh “failed to compl[il]y with the conditions of [his] status because [he] completed [his] program and did not depart the United States.” (JA at 335.)

is inadmissible or deportable from the United States if the alien-

- (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
- (B) has been a person of good moral character during such period;
- (C) has not been convicted of an offense . . . and
- (D) *establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.*

INA § 240A(b), 8 U.S.C. § 1229b(b) (emphasis added). Here, the IJ did not abuse his discretion to deny Saneh's motion. Following testimony from Saneh's family, the IJ found that Saneh failed to qualify for cancellation of removal because Saneh did not prove "exceptional and extremely unusual hardship" to Saneh's children, both of whom are United States citizens. The record is replete with over 140 pages bespeaking his children's academic and extracurricular accomplishments. (JA at 174-321.) Saneh also asserts that his son Mohamed suffers from type-1 diabetes. (JA at 57, 59-60.) Nevertheless, we do not review the IJ's finding *de novo*, but rather under a highly-deferential abuse of discretion standard. The IJ explained that Saneh failed to prove the extreme

circumstances necessary to rise to the level required for cancellation of removal under § 240A(b). Saneh presents no evidence, and we find no basis to support, that the IJ acted arbitrarily, irrationally, or contrary to law. *See Babai*, 985 F.2d at 255. Thus, we cannot find that the IJ abused his discretion to deny Saneh's application to cancel his removal.

As the IJ noted, Saneh "was given the choice of two unpleasant alternatives (1) a removal order with the right of appeal or (2) a final order of voluntary departure." (JA at 118.) Even had he not agreed to voluntary departure, Saneh would still have been found removable. Accordingly, Saneh fails to show that he would have been prejudiced by the allegedly improper waiver.

### III.

For the foregoing reasons, we hereby affirm.

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**APPENDIX B**

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**U.S. Department of Justice**

**Executive Office for Immigration Review**

*Board of Immigration Appeals Office of the Clerk*

*5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041*

**Herman Dhade  
28230 Orchard Lake Rd, Ste 201  
Farmington Hills, MI 48334**

**Office of the District Counsel/DET  
333 Mt. Elliott St., Rm. 204  
Detroit, MI 48207**

**Name: SANEH, ABDUL     A27-400-115**

**Date of this Notice: January 11, 2007**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr  
Donna Carr  
Chief Clerk

Enclosure

13a

Panel Members:

GRANT, EDWARD R.

**U.S. Department of Justice**  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A27-400-115 - Detroit      Date: JAN 11 2007

In re: ABDUL SANEH

IN REMOVAL PROCEEDINGS

APPEAL/MOTION

ON BEHALF OF RESPONDENT: Dhade, Herman,  
Esquire

ON BEHALF OF DHS: Dobson, Michael B.,  
Esquire  
Assistant Chief Counsel

ORDER:

PER CURLAM. The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4). The motion for transcripts is denied. The request for a stay is also denied.

/s/  
FOR THE BOARD

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**APPENDIX C**

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**UNITED STATES DEPARTMENT  
OF JUSTICE EXECUTIVE OFFICE  
FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
1155 Brewery Park Blvd., Suite 450  
Detroit, MI 48207**

**Case No.: A: 27-400-115**

**[Dated April 12, 2006]**

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**In the Matter of:** )  
 )  
SANEH, Abdul )  
 )  
RESPONDENT/APPLICANT )  

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Docket: Detroit

In Removal Proceedings

**DECISION AND ORDER ON**  
**MOTION TO RECONSIDER**

On February 23, 2006, respondent appeared before the Court for the purpose of litigating a cancellation of removal application pursuant to INA § 240A(b)(I). He also hoped to adjust his status, but could not do so as he had no proof that a visa was immediately available.

Respondent's counsel stipulated he could not demonstrate there was a visa immediately available.

After the Court received all the evidence on the cancellation of removal, the Government offered to allow the respondent to avail himself of pre-hearing voluntary departure. Respondent and counsel revealed they would have an answer within twenty minutes. The Court then commenced deliberations. Thirty minutes later, the Court was called to order and the Court issued its decision - - after respondent indicated he was ready to accept the Court's decision. Hence, the respondent represented to the Court prior to the decision he was not interested in the Government's offer.

After the Court (1) denied respondent's application for, *inter alia*, his inability to prove exceptional and extremely unusual hardship and (2) denied post-hearing voluntary departure as respondent had no viable travel document, the respondent requested that the Government renew its offer of pre-hearing voluntary departure. When the Government acquiesced, the respondent then again pondered the renewed offer and then ultimately accepted the offer. During discussions with the respondent the, the Court noted, *inter alia*, (1) respondent's counsel advises, but the decision to withdraw an application and/or seek voluntary departure is entirely respondent's; (2) immigration law is in a state of constant flux, and what might be true today, may not be true in the future.

The Court then granted respondent's voluntary request and issued the order granting respondent's 120 days of voluntary departure under the agreed upon

condition that respondent could not move to reopen his case.

On March 24, 2006, respondent moved that the Court reconsider its order so that he can "resume the application for adjustment of status and cancellation of removal." Simultaneously, the respondent requested a "stay of deportation."

On April 6, 2006, the Court denied the motion to stay, as there was no outstanding order of removal.

Respondent claims there was duress and that there were promises that respondent would be able to immigrate to the United States in 14 months. While the Government argued in its closing argument on cancellation that the respondent might be able to adjust his status in the near future, there was never any such promise.

Next, there was absolutely no duress. Respondent was ineligible for adjustment and he lost his cancellation case. If anything, the Court and the Government fairly entertained respondent's request for voluntary departure when he was not otherwise eligible.

Succinctly stated, respondent cannot "resume" his application for adjustment of status because his priority date is not current, and because he is statutorily ineligible for adjustment of status pursuant to section 245(c) of the Act because he is out of status and he failed to establish that the labor certification filed on his behalf on or before the sunset date of section 245(i) was "approvable when filed." Respondent is not able to "resume" his cancellation application

because this Court denied the application before respondent entered into his knowing, intelligent, and voluntary stipulation to withdraw his applications for relief and accept a final order of voluntary departure.

As discussed above, respondent was given the choice of two unpleasant alternatives (1) a removal order with the right of appeal or (2) a final order of voluntary departure. He made a knowing, intelligent, and voluntary decision to enter into the stipulation. As respondent has given the Court no viable reason to withdraw from an agreement he requested, the motion to reconsider is denied.

/s/ Robert D. Newberry  
ROBERT D. NEWBERRY  
Immigration Judge

4/12/06  
DATE

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**APPENDIX D**

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**UNITED STATES DEPARTMENT  
OF JUSTICE EXECUTIVE OFFICE  
FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
1155 Brewery Park Blvd., Suite 450  
Detroit, MI 48207**

**Case No. A: 27-400-115**

**[Dated April 6, 2006]**

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<b>In the Matter of:</b>	)
	)
<u>SANEH, Abdul</u>	)
	)
RESPONDENT/APPLICANT	)

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Docket: Detroit

In Removal Proceedings

**DECISION AND ORDER ON MOTION  
TO STAY DEPORTATION**

On February 23, 2006, respondent appeared before the Court for the purpose of litigating a cancellation of removal application pursuant to INA § 240A(b)(I). He also hoped to adjust his status, but could not do so as he had no proof that a visa was immediately available.

After the Court received all the evidence on the cancellation of removal, the Government offered to allow the respondent to avail himself of pre-hearing voluntary departure. Respondent and counsel revealed they would have an answer within twenty minutes. The Court then commenced deliberations. Thirty minutes later, the Court was called to order and the Court issued its decision - - after respondent indicated he was ready to accept the Court's decision.

After the Court (1) denied respondent's application for *inter alia*, his inability to prove exceptional and extremely unusual hardship and (2) denied post-hearing the voluntary departure as respondent had no viable travel document, the respondent requested that the Government renew its offer of pre-hearing voluntary departure. When the Government acquiesced, the respondent then again pondered the renewed offer and then ultimately accepted the offer.

The Court then granted respondent's request and issued the order granting respondent's 120 days of voluntary departure under the condition that respondent could not move to reopen his case.

On March 24, 2006, respondent moved that the Court reconsider its order so that he can "resume the application for adjustment of status and cancellation of removal." Simultaneously, the respondent requested a "stay of deportation."

The Court will rule on the motion to reconsider in due course. However, as respondent has until "4-24-2006" to present his travel document and until 6-23-06 to depart, the voluntary departure order has not, yet,

21a

become an order of removal triggering the fine and the ten year ineligibility period. Thus, there is no deportation to stay.

The Motion to Stay of Deportation is denied as moot.

/s/ Robert D. Newberry  
ROBERT D. NEWBERRY  
Immigration Judge

4-6-2006  
DATE

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**APPENDIX E**

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**U. S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE  
FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
1155 Brewery Park Blvd., Suite 450  
Detroit, MI 48207**

**Case No.: A: 27-400-115**

**[Dated February 23, 2006]**

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<b>In the Matter of:</b>	)
	)
<b>SANEH, ABDUL</b>	)
	)
<b>RESPONDENT</b>	)

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**IN REMOVAL PROCEEDINGS**

**ORDER OF THE IMMIGRATION JUDGE**

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge in the Notice to Appear. The respondent has made application solely for voluntary departure in lieu of removal.

It is **HEREBY ORDERED** that the respondent be **GRANTED** voluntary departure in lieu of removal, without expense to the Government on or before

~~6-23-2006, or any extensions as may be granted by the District Director, Immigration and Naturalization Service, and under whatever conditions the District Director may direct. [initials RN]~~

It is FURTHER ORDERED:

[ ] That the respondent post a voluntary departure bond in the amount of \_\_\_\_\_ with the Immigration and Naturalization Service on or before \_\_\_\_\_.

[x] That the before respondent shall provide the Immigration and Naturalization Service travel documentation sufficient to assure lawful entry into the country to which the alien is departing within 60 days of this order, or within any time extensions that may be granted by the Immigration and Naturalization Service.  
[handwritten date 4-24-2006]

[x] Other Respondent agrees to not file a motion to reopen.

It is FURTHER ORDERED that if any of the above ordered conditions are not met as required, the above order shall be withdrawn without further notice or proceedings and the following shall thereupon become immediately effective: respondent shall be removed to Lebanon on the charge in the Notice to Appear.

It is FURTHER ORDERED that if respondent fails to depart as required, the above order shall be withdrawn without further notice or proceedings and the following order shall become immediately effective: respondent

shall be removed to Lebanon on the charge in the Notice to Appear.

You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date will result in your being found EB2 [handwritten notation : or successor] ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A. below) for a period of ten (10) years from the date of scheduled departure. Your Voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than \$1000 and not more than \$5000.

**A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BE INELIGIBLE ARE:**

- 1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
- 2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and
- 3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice was given to the alien in his/her native language, or in a language he/she understands.

25a

/s/ Robert D. Newberry  
ROBERT D. NEWBERRY  
Immigration Judge  
Date: Feb 23, 2006

Appeal : WAIVED (A/I/B)  
Appeal Due By: N/A

CERTIFICATE OF SERVICE  
THIS DOCUMENT WAS SERVED BY:

PERSONAL SERVICE (P)

TO: ☒ ALIEN ☒ Alien's ATT/REP ☒ INS

DATE: Feb 23, 2006 BY: COURT STAFF /s/

Attachments: ☐ EOIR-33 ☐ EOIR-28 ☐ Legal  
Services List ☐ Other

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**APPENDIX F**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**No. 07-3079**

**[Filed October 10, 2008]**

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ABDUL SANEH,	)
	)
Petitioner,	)
	)
v.	)
	)
MICHAEL MUKASEY,	)
ATTORNEY GENERAL,	)
	)
Respondent.	)

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**ORDER**

**Before: KEITH and SUTTON, Circuit Judges;  
ACKERMAN,\* District Judge.**

Abdul Saneh petitions this court for rehearing en banc of its June 23, 2008, opinion and order affirming the decision of the Board of Immigration Appeals

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\* Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

(“BIA”) denying his motion for reconsideration of his voluntary-departure order. Saneh argues principally that the court’s opinion contravenes the Supreme Court’s decision in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008). Because *Dada* does not entitle Saneh to a different outcome in his case, his petition for rehearing is denied. In *Dada*, the Court held that “to safeguard the right to pursue a motion to reopen for voluntary departure recipients, [an] alien must be permitted to withdraw, unilaterally, a voluntary departure request before the expiration of the departure period, without regard to the underlying merits of the motion to reopen.” *Id.* at Congress has conferred on aliens deemed removable the right to “file one motion to reopen [the removal] proceedings,” 8 U.S.C. § 1229a(c)(7), and the Court held it would undermine this right if an alien who had requested voluntary departure but then filed a motion to reopen was precluded from pursuing his motion by complying with the terms of the voluntary departure. *See* 128 S. Ct. at 2319–20. Saneh argues that under *Dada*, he too had an unequivocal entitlement to withdraw from his voluntary-departure agreement—an agreement he requested and the government granted even *after* the IJ had ruled him ineligible for voluntary departure—to file a motion to reopen. Pet. at 6.

Saneh is wrong: *Dada* neither warrants nor requires a different outcome in his case. To be sure, Saneh did forgo the opportunity to file a motion to reopen his proceeding. But his forfeiture of his statutory right to seek reopening stemmed not from the intersection of two conflicting statutory provisions, the cause of *Dada*’s dilemma, but rather from his own compromise with the government. In requesting voluntary departure, Saneh expressly “agree[d] to not

file a motion to reopen,” JA 350—not a boilerplate provision but a tailor-made concession. Thus, whatever Saneh lost by agreeing to voluntary departure, he lost by his own deliberate consent.

Moreover, so far as the record shows, at no point in the agency proceedings—nor at any time in this appeal prior to this petition, for that matter—has Saneh ever sought to reopen his case or complained of his inability to do so. Instead, before the IJ, the BIA and this court he has identified the voluntary-departure agreement itself—which he discovered too late will bar his return to the United States for a decade—as the source of his grievance, not its side-effect of precluding him from filing another motion. The most Saneh lost by imploring the government to reinstate its offer of voluntary departure was the ability to appeal the IJ’s original order, about which *Dada* said nothing. In short, Saneh’s complaint thus falls outside the four corners of *Dada*’s directive to “safeguard” his right to move to reopen, and therefore he is not entitled to a different disposition. Accordingly, we deny his petition for rehearing.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green  
Leonard Green  
Clerk